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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-531

PAULA NEWELL AND CYNTHIA WHITE
Petitioners

VERSUS

ORLEANS PARISH SCHOOL BOARD
Respondent

VICTORIA DIMITRY WILLIAMS
Petitioner

VERSUS

ORLEANS PARISH SCHOOL BOARD
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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The instant proceedings were instituted as separate demands, one on a petition for injunctive relief and the other for a Writ of Mandamus, in the Civil District Court for the Parish of Orleans, State of Louisiana. Separate appeals were loged in

the Louisiana Court of Appeal for the Fourth Circuit and were consolidated for the purpose of presenting oral argument by order of that court signed on December 4, 1978. See Motion and Order appended to the Petition for Certiorari, Appendix, pages 15-16.

The opinion in the Paula Newell, et al. appeal bears the No. 10,000 of the Docket of the Court of Appeal, Fourth Circuit, State of Louisiana, is dated April 10, 1979, and is reported at 370 So.2d 655. This opinion is appended to the Petition for Certiorari, Appendix, pages 18-24.

The opinion in the Victoria Dimitry Williams appeal bears the No. 10,108 of the Docket of the Court of Appeal, Fourth Circuit, State of Louisiana, is dated April 10, 1979, and is reported at 370 So.2d 658. This opinion is appended to the Petition for Certiorari, Appendix, pages 25-27.

Petitioners White, Newman and Williams jointly applied for rehearing by the Court of Appeal, Fourth Circuit, State of Louisiana. That court rendered a *Per Curiam* opinion denying said application. The denial is reported at 370 So.2d 655, 658 and at 370 So.2d 658 for both appeals. This opinion is appended to the Petition for Certiorari, Appendix, pages 28-29.

In proceedings numbered 64,907, petitioners White, Newman and Williams jointly petitioned the Supreme Court of Louisiana for a Writ of Certiorari. On July 2, 1979, that Court denied the said Petition for Certiorari without assigning written reasons therefor. The denial is reported at 373 So.2d 531 and is appended to the Petition for Certiorari herein, Appendix, pages 30-31.

JURISDICTION

Respondent admits that petitioners have made a timely application to this Court from the final judgments rendered by the highest court of the State of Louisiana in which such decisions could be had. As discussed in herein below, there are serious questions as to the manner in which the constitutional claims were raised and with respect to the scope of any such constitutional claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Petitioners assert that the United States Constitution Fourteenth Amendment, Section 1 is involved herein which provides, in pertinent part, that:

> ". . .[N]or shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

B. The Louisiana Sabbatical Leave Law, La.Rev.Stat.Ann. §17:1171-1185, 1187 (Vol. 13A, pages 122-134 and Supp., 1979, pages 27-30), is rather lengthy. The entire statutory scheme for such leaves is appended to this Brief as Appendix A, pages A-1 - A-7. The section governing eligibility in effect at the time this dispute arose (Id., Sec. 1171) is recited herewith for this Court's convenience:

> "Members of the teaching staff of public schools in all parishes and municipalities of the State of Louisiana shall be eligible for sabbatical leaves, for the purpose of rest and recuperation, for the two semesters immediately following any twelve

or more consecutive semesters of active service in the parish where the teacher is employed, or for the one semester immediately following any six or more consecutive semesters of service.

"Absence on sick leave under Sub-part B of this Part shall not be deemed to interrupt the active service herein provided for; nor shall absence on involuntary military service in the armed forces of the United states, nor on military leave under R.S. 17:1215, be deemed to interrupt the active service herein provided for retroactive to the school session in 1960-1961 beginning in the year 1960." [1]

C. Louisiana's Maternity Leave Statutes, La.Rev.Stat.Ann. §17:1211-1213, Vol. 13A, pages 141-144, provide:

§1211. "The city and parish school boards throughout the state shall grant leaves of absence to regularly employed women teachers for a reasonable time before and after childbirth.

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1. By La.Act No. 385, §1 of 1978, effective September 8, 1978, the second paragraph of Section 1171, *supra* Supp., 1979, was amended to provide as follows:

"Absence or sick leave under Subpart B of this Part or on maternity leave of absence, as provided for under Subpart C of this Part, for the period of disability occasioned by pregnancy and/or childbirth as determined by a certificate from the employee's attending physician shall not be deemed to interrupt the active service herein provided for; nor shall absence on involuntary military service in the Armed Forces of the United States, nor on military leave under [La.] R.S. 17:1215, be deemed to interrupt the active service herein provided for retroactive to the school session in 1960-61 beginning in the year 1960."

The granting of such leaves shall not affect any of the tenure rights which the teacher may have acquired prior thereto under the provisions of R.S. 17:441 through 17:444 or R.S. 17:461 through 17:463.

§1212. "The position vacated by a teacher who has been granted a maternity leave, or by a teacher transferred to the position vacated by a teacher taking a maternity leave, in accordance with R.S. 17:1211, may be filled by the respective school boards by the appointment of substitute teachers.

§1213. "A substitute teacher appointed under the provisions of R.S. 17:1112 shall not acquire any of the tenure rights or priviliges provided for in R.S. 17:441 through R.S. 17:444 or in R.S. 17:461 through R.S. 17:463, unless the substitute teacher has subsequently been appointed to fill a regular vacancy and has the necessary qualifications."

QUESTIONS PRESENTED

1. Under Louisiana's Sabbatical Leave Law, La.Rev.Stat.Ann. §17:1171, *et seq.* (herein referred to as the Sabbatical Leave Law), eligibility for such leave is dependent upon a number of continuing conditions having been met, including the requirement that the teacher must have the necessary semesters of continous active service immediately preceding the semester for which such leave is sought. As such;

   A. Does the denial of eligibility to teachers who have been on prolonged elective maternity leaves of absence violate the Equal Protection guarantees of the Fourteenth Amendment

when other elective leaves and voluntary breaks in active service are similarly treated?

B. Has there been an undue burden placed upon a teachers' right to bear children under the circumstances of these cases, particularly where petitioners have not shown that they were unable to perform their teaching duties because of pregnancy or childbirth for the periods of time during which they were on their maternity leaves of absence?

2. Have Petitioners fairly and adequately raised their purported Constitutional claims in the lower state courts and thus preserved them for review by this Court?

STATEMENT OF THE CASE

Respondent respectfully suggests that a number of relevant facts have not been adequately discussed in the Petition for Certiorari at pages 4-6. For this reason, Respondent submits the following Statement.

Respondent, Orleans Parish School Board (hereinafter "School Board"), is a political subdivision of the State of Louisiana. As such, it maintains and operates the public elementary and secondary schools in the Parish. Orleans Parish is coterminous with corporate limits of the City of New Orleans.

The School Board had employed Petitioner White as a teacher from September, 1973 through May, 1976, a period of six semesters of continuous active service. Petitioner White

applied for, and was granted, a maternity leave absence for the entire 1976-77 school year. While Mrs. White was still on that leave, she applied for a sabbatical leave of absence for the Fall Semester of the next school year. The stated purpose for this leave was to pursue course work leading to a Master's Degree in Speech and Hearing Therapy. (Tr., Jan. 6, 1978, pp. 27-28 [2])

The Superintendent of Schools declined to recommend to the School Board that it grant to Mrs. White the requested leave. In so doing, he advised Mrs. White on July 22, 1979 that her year-long maternity leave of absence constituted an interruption of the continuous active service requirement for sabbatical leave eligibility. Thereafter, she sought and obtained a special leave of absence without pay for the entire 1977-78 school year to pursue her course work. (Tr. Jan. 6, 1978, pp. 31-33)

The School Board also employed Petitioner Newman as a teacher. She was first employed in August, 1966 and had been on continuous active service in that capacity from January, 1971 until the end of May, 1977, a period of thirteen semesters. In June, 1977, she applied for, and was granted, a maternity

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2. The transcript reference pertains to proceedings held in the Civil District Court, Parish of Orleans, Louisiana in the matter entitled, "Paula Newell and Cynthia White v. Orleans Parish School Board", Docket Number 77-16442, Court of Appeal Number 10,000. Transcript and record references in regards to Petitioners White and Newman are found in these proceedings. Similar references to Petitioner Williams are found in the proceedings entitled, "Victoria Dimitry Williams v. Orleans Parish School Board", Civil District Court Docket Number 77-12806, Court of Appeal Number, 10,808.

leave of absence to terminate at the end of the Fall Semester of the 1977-78 school year. In November, 1977, she applied for a sabbatical leave of absence for the Spring Semester of that school year. She stated that the purpose of her leave was to allow her to pursue graduate level course work at a local university. (Tr., Jan. 27, 1978, pp. 15-18) Her application was denied on December 13, 1977 because her prolonged maternity leave had interrupted her continuous active service as required by the Sabbatical Leave Law. She thereafter sought and obtained an extension of her maternity leave for the Spring Semester in order to pursue her course work. (Tr., Jan 27, 1978, pp. 15-16; O.P.S.B.-Newman, Exhibit 3).

Petitioner Williams has been employed by Respondent from August, 1970 as a teacher. She was actively employed until August, 1976 when she commenced her requested maternity leave of absence. She returned from that leave in late April, 1977 for the balance of that school year, approximately one month. In June, 1977, Mrs. Williams applied for a sabbatical leave for the 1977-78 school year; she wanted to return to school for additional course work. (Tr., Aug. 30, 1977, p. 13) Her leave application was not approved because of her prolonged maternity leave. (Tr., Aug. 30, 1977, p. 4)

On October 25, 1977, Petitioner White, along with Paula Newell [3], petitioned the Civil District Court for a writ of man-

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3. Paula Newell later resigned from her employment by Respondent and voluntarily withdrew her claim. It is noteworthy, however, that Mrs Newell had been on successive maternity leaves for the 1975-76 and the 1976-77 school years. (Original Petition, para. III-IV, p. 1).

damus [4] directing the School Board to grant the requested sabbatical leaves at "such dates and time periods for these leaves as may fit within the petitioners' schedules, recognizing that since a large portion of the fall, 1977 semester has elapsed it may not be in the best interest of the petitioners to take sabbatical leaves for the current semester." [5]

Whatever claims under the Constitution were made appear only at paragraph X of this petition; as follows:

> "The actions of the defendant Orleans Parish School Board in denying petitioners their sabbatical leaves of absence because of their maternity and/or sick leave 'interrupted' the consecutive semesters required violate their rights under Article I, Sections 2 and 3, of the Louisiana Constitution of 1974 and the 14th Amendment of the Constitution of the United States."

In due course, the School Board answered this petition for mandamus. Therein, it admitted the salient facts of the plaintiff's employment, denied others, claimed interruption, and asserted the defense of mootness because of Mrs. White's subsequent special leave, and, that said leave constituted yet another interruption of the active service requirement.

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4. Under Louisiana procedural law, mandamus proceedings are summary in nature and are designated to be conducted with rapidity. La.CodeCiv.Proc.Ann., Arts.2591,3781. Mandamus is a writ directing a public officer to "compel the performance of a ministerial duty required by law." *Id.*, Art. 3863.

5. Original Petition, Prayer, p. 3.

In response to the purported Constitutional Claim, the School Board asserted same to be mere conclusions of law and alternatively denied those allegations.

On December 23, 1977, the original plaintiffs filed an Amended and Supplemental Petition. Therein, Mrs. Newman was added as another plaintiff. The factual allegations respecting this teacher are essentially as set forth above. The School Board answered this petition admitting the pertinent allegations regarding Mrs. Newman's employment, claimed interruption and further showed that she had sought an extension of her maternity leave for the Spring Semester of the 1977-78 school year.

On August 17, 1977, Mrs. Williams filed a separate petition for declaratory and injunctive relief with respect to her sabbatical leave for professional improvement. She prayed for preliminary and permanent injunctions restraining the School Board from denying the sabbatical leave for the 1977-78 school year and for a judgment "declaring that proper construction of La.R.S. 17:1171 et seq. will result in granting petitioner's request for a sabbatical leave * * *." (Original Petition, Prayer, p.2)

Mrs. Williams' claim for irreparable harm necessary for a preliminary injunction was predicated on the allegation that she was enrolled at University of New Orleans and that "unless she continues her course of study she may lose certain credits earned towards her masters [degree]." (Original Petition, para. 7, p. 2)

By an Amended and Supplemental Petition filed in the District Court on August 26, 1977, Mrs. Williams added paragraph 8 to her original petition. That paragraph contains allegations which are almost identical to the purported Constitutional Claims of Mrs. White. *Supra*, at page 9.

The School Board answered the original petition admitting Mrs. Williams' employment status and claimed the interruption of the active service requirement for sabbatical leave eligibility. It also specially denied her claim of irreparable harm.

The hearing on Mrs. Williams' prayer for a preliminary injunction was held in the District Court on August 30, 1977. No testimony or other evidence was received at that time. The teacher's employment history and the denial of the requested leave, as alluded to above, were established by stipulation between counsel at the request of the trial court. (See Tr. p. 2) No irreparable harm was shown.

With respect to the asserted Fourteenth Amendment Claim, plaintiff's attorney made only the following comments at the hearing:

> "MR. NELSON:
>
> "There are many [reported] cases on a maternity leave when someone is discriminated against. I'm not saying she is discriminated against. I don't want to get into an argument with [Mr. Endom] about that but that is discrimination according to sex. * * * (Tr. p. 4).
>
> * * * *
>
> "The other point is the constitutional question. The constitution, and especially Louisiana Con-

> stitution which is much stricter than the Fourteenth Amendment of the United States Constitution, Article 5 of Section One specifically states that there shall be no discrimination based on sex. [6] This is obviously a discriminatory act based on sex, may it please the Court. There is no state interest that I can possibly think of that would be protected by refusing this lady a maternity [sic] leave."
> (Tr. pp. 11-12)

No argument, much less evidence, was advanced at the hearing on the preliminary injunction in support of any Due Process Claim that may have existed.

At the conclusion of the arguments, the District Court granted a preliminary injunction in favor of Mrs. Williams directing the School Board to grant the requested sabbatical leave upon her furnishing bond in the amount of $4,000.00. (Order, September 2, 1977) The trial court did not assign written reasons or make any findings of fact in support of this order. During the course of the argument, the trial judge did state:

> "* * * What I'm trying to determine is what the Legislature meant as to the rights of the sabbatical. I think it would have said so if it ever addressed itself to that point directly. It's just beyond my imagination that given addressing that point, that the Legislature would resolve and say, if you ask for maternity leave, your service is interrupted for the purpose of sabbatical computation.

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6. La.Const.Ann., Art. I, §3 provides in pertinent part: "No person shall be denied the equal protection of the laws. * * * No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of * * * sex * * *."

> "That's my interpretation, right or wrong, I will sign a judgment to that effect in the case of Victoria Williams."[7]

The trial court granted a devolutive appeal to the Court of Appeal on the School Board's motion. This appeal did not suspend the Order for the preliminary injunction during the pendancy of the appeal. (Order, September 19, 1977) We understand that Mrs. Williams took her leave as ordered after she furnished the required bond.

The October, 1977 petition of Newell, *et al.* was originally set for November 18, 1977. After several continuances, this mandamus action was heard by the District Court (in another division of that Court) on January 6 and 27, 1978. Mrs. White testified on the first date.

Mrs. White testified that the reason why she wanted to go on a sabbatical leave was because she was interested in speech therapy. (Tr., Jan. 6, 1978, pp. 27-28) During cross-examination, Mrs. White withdrew any assertion that she was claiming she was on sick leave; that is, disabled during her entire maternity leave. Indeed, when respondent cross-examined Mrs. White as to her activities while she was on maternity leave (did she spend part of the time raising her infant) her attorney objected. (Tr., Jan. 26, 1978, pp. 34-35).

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7. By subsequent enactment, the Louisiana Legislature declared that only the disability portion of a maternity leave would not interrupt the active service requirement. See, La. Act. No. 385 of 1978, *supra*, at p. 5, n. 1.

On January 27, 1978, Petitioner Newman testified on behalf of her claim. When she was asked whether or not she was seeking the sabbatical to take care of her child, she testified that her purpose was, "To work for my M.A. plus 30. I would take care of my kid [sic] if I was teaching." (Tr., Jan 27, 1978, p. 17) She also testified that she obtained an extension of her maternity leave for another semester after she was denied the sabbatical. When asked whether or not her interest in seeking the extension was to take care of her infant, she answered:

> "To work for my M.A. plus 30 and I submitted that form to protect my rights. If I submitted a [special] leave without pay and a leave of absence and you would argue that it [the special leave] definitely interrupts." (Tr., Jan. 27, 1978, p. 16)

With respect to the Equal Protection arguments, plaintiffs submitted a Pre-Trial Memorandum to the trial court. The second of the two syllabus points stated therein that:

> "Defendant's actions in denying petitioners applications for a sabbatical leave constitutes arbitrary and capricious discrimination on the basis of sex, in violation of the Fourteenth Amendment of the U.S. Constitution, and under Article 1, Sections 2 and 3 of the Louisiana Constitution of 1974."

Under that syllabus point, plaintiffs primarily relied on *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1964, 36 L.Ed. 2d 583 (1973) and *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). No Due Process Claims were asserted therein.

On February 6, 1978, the District Court rendered judgment granting a retroactive sabbatical leave to Petitioner White for the Fall Semester of the 1977-78 school year. Petitioner Newman was granted a sabbatical leave, retroactive to the beginning of the Spring Semester of that year. The trial court made no written findings of fact and stated as its reason for granting the writ that the School Board's answer was "insufficient". (Judgment Maintaining Writ of Mandamus, February 6, 1978) On February 21, 1978, the School Board obtained an Order of Suspensive Appeal to the Fourth Circuit Court of Appeal.

After the appeals in both cases had been lodged with the Fourth Circuit Court of Appeal, Respondent obtained an order from that Court consolidating both appeals, "for the purpose of presenting oral argument." (Petition for Certiorari, Appendix,pp. 15-17).

On appeal, the Petitioners herein filed a joint reply brief. In that portion of their brief dealing with their purported Constitutional claims, they again asserted a sex discrimination claim:

> "A construction of La.R.S. 17:1171 to the effect that maternity leaves interrupt active service, but military and sick leaves do not, constitutes discrimination based on sex." (Reply Brief, p. 11)

In support of that assertion, they again cited to the Appeals Court the decisions in *Frontiero v. Richardson, supra,* and *Reed v. Reed, supra.* (Ibid., at pp. 11-12)

Petitioners did cite to the Appeals Court the decisions in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 640, 94 S.Ct. 791, 39 L.Ed.2d 52 (1973) relative to the prohibition of the Due Process Clause against penalizing the "pregnant teacher for deciding to bear a child [by] overly restrictive maternity leave regulations." But even then, they did not demonstrate therein how and to what extent there was a "heavy burden" on that decision in these cases.

These Claims were disposed of by the Court of Appeal:

> "Appellees charge our holding is unconstitutional in that it abridges due process and equal protection guarantees afforded plaintiffs by the state and federal constitutions. Without developing argument in which respects both guarantees are violated, plaintiffs basically take an equal protection approach and argue the failure to credit maternity leave as active service is sex discrimination. La. Const. of 1974, Art. 1, § § 2 and 3, and Amendment 14 of the United States Constitution provide, *inter alia*, that all persons regardless of sex, are entitled to equal protection (and administration) of law.
>
> "The equal protection argument fails in the light of the holding in *General Elec. Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), and the jurisprudence it discusses and distinguishes. Were the distinctions involving pregnancy mere pretexts designed to effect an invidious discrimination against members of the female sex, the Court pointed out, then the laws so regulating rights of childbearing women would be a denial of equal protection. However, it was noted that the mere fact that only women can become pregnant does not render every legislative act regulating pregnancy a gender-based discrimination.

> "The sabbatical leave laws, as administered by the Board, permitted these women teachers who elected to have children the right to maintain active service status during the childbearing period. [2] The failure to extend active status to the elective (not medically required) child-caring period created no abridgement of the equal protection guarantees constitutionally afforded plaintiffs. Nor do we consider the laws as administered to constitute a denial of property without due process of law.
>
> "If we were to interpret the law as plaintiffs suggest, it would be possible for a teacher with three pregnancies and safe deliveries within a three-year period to acquire sabbatical leave without any active teaching time. As R.S. 17: 1171 indicates, sabbatical leave is for the purpose of either continuing education or rest and recuperation. It is not a vacation period that accrues after so many years of service."

"2. Apparently acting to eliminate the inequity of the interruption of continuous service compelled by pregnancy and childbirth and to avoid the constitutional prohibition against gender-based discrimination, the legislature adopted Act No. 385 of 1978 amending R.S. 17:1171 to provide that '* * * the period of disability occasioned by pregnancy and/or childbirth as determined by a certificate from the employee's attending physician, shall not be deemed to interrupt the active service herein provided for * * *.' The amendment conforms with the policy of the Orleans Parish School Board in effect prior to the adoption of this amendment." (Petition for Certiorari, Appendix pp. 21-22).

On Application for rehearing by the Court of Appeal, Petitioners asserted for the first time that there was no individualized determination of the disability period within the time granted for maternity leaves. They therefore claimed that there was an "irrebutable presumption". (Application for Rehearing, Articles V and VI) But, they did not demonstrate from the records of these two cases that Petitioners were physically unable to work because of pregnancy or childbirth for the entire period of their respective maternity leaves. (We submit the contrary appears, or the issue was not raised in the trial court as to each of these Petitioners.) Nor did they demonstrate from the record that there were no individualized determinations.

After the Court of Appeal denied a Rehearing to reverse the adverse judgments rendered against them, the Petitioners herein filed a joint petition to the Louisiana Supreme Court for a writ of certiorari. There, they assigned three errors in the appellate court ruling. Two assignments were on purported Constitutional grounds. The first assignment charged that the lower court "failed to consider the decision of the United States Supreme Court in *Cleveland Board of Education v. LaFleur.*" (Petition for Writ of Certiorari, Louisiana Supreme Court, Assignment of Error I) The other claimed error was the holding that "plaintiffs equal protection argument fails in the light of the holding in *General Electric Co. v. Gilbert.*" (*Ibid.*, Assignment of Error III).

As to the latter, they reurged their sex discrimination claim noting different treatment for teachers on sick and military leaves. (Id., at pp. 11-14)

ARGUMENT

There are many reasons why this Court should not review these cases. Firstly, we submit that Petitioners alleged the vaguest possible Constitutional grounds when they asserted in their district court petitions that the denial of their sabbatical leaves "violate their rights under * * * the 14th Amendment of the Constitution of the United States." *Supra*, at pp. 9 and 11. These allegations are most amorphous.

We submit that this Court has long pursued a, "policy of avoiding Constitutional decisions until the issues are presented with clarity, precision and certainty." *Rescue Army v. Municipal Court*, 331 U.S. 549, 567, 67 S.Ct. 1409, 1423, 91 L.Ed. 1666 (1947). As stated in *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 n.2, 92 S.Ct. 1716, 1719-20 n.2, 32 L.Ed.2d 317 (1972): "This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clear-cut and concrete form.' *Rescue Army v. Municipal Court*, [supra]."

Thus, in *Ellis v. Dixon*, 349 U.S. 458, 462, 75 S.Ct. 850, 853, 99 L.Ed. 1231 (1955), this Court dismissed its writ of certiorari as being improvidently granted because of the insufficiency of that petitioner's pleading. The Court stated: "What has been alleged is entirely too amorphous to permit adjudication of the Constitutional issues asserted."

The reported decision in *Ellis, supra*, 349 U.S., at p. 460 n.3, 75 S.Ct., at pp. 852-53 n.3, recited the constitutional issue asserted in the district court pleadings; as follows:

> " '17. That by reason of the action of the respondents in failing to give a reason for its action whereas permission is freely granted to others applying it is evident that the respon-

> dents are concealing a design to discriminate against petitioner and his said organization, for which discrimination there is no foundation in law or fact, and that the acts of respondents are arbitrary and unreasonable.
>
> 18. The action of respondents violates the right of petitioner and the constituent members of his organization freedom of speech and assembly guaranteed by the Constitution of the United States and denies them the equal protection of the laws in violation of the Constitution of the United States.' "

Given the allegations appearing in the petitions filed in the district court, and applying the principles above, we respectfully suggest that it would not be inappropriate to refuse certiorari herein on the basis of insufficiency of the pleadings alone.

Furthermore, we submit that the Statement of the Case, *supra*, amply demonstrates that Petitioners have made significant changes in their initially ill-defined position as asserted in their original state court petitions. At first, they simply attacked the "actions of the School Board" in denying the sabbatical leaves. (Original Petition, see pp. 9 and 11, *supra*). They now assert in the Argument portion of their Petition to this Court that the wording of §1711 itself violates the guarantees of the Equal Protection Clause (Petition for Certiorari, p. 13). In this connection, it is noteworthy that in Mrs. Williams' Petition before the State District Court, she prayed for a declaratory judgment, "declaring that proper construction of La. R.S. 17:1171 et seq. will result in granting petitioner's request for a sabbatical leave * * *."

In argument before the State Trial and Appellate Courts, Petitioners consistently maintained their claim was predicated on a charge of sex discrimination. The Court of Appeal recognized their charge as such when it stated:

> "Appellees charge our holding is unconstitutional in that it abridges due process and equal protection guarantees afforded plaintiffs by the state and federal constitutions. Without developing argument in which respects both guarantees are violated, plaintiffs basically take an equal protection approach and argue the failure to credit maternity leave as active service is sex discrimination. * * *."
> (Petition for Certiorari, Appendix, p. 21).

In this same connection, the principle restated in *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360 (1969), is appropriate:

> "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, *e.g.*, *Bailey v. Anderson*, [326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945)]; *Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 128, 131-133, 25 S.Ct. 200, 201, 49 L.Ed. 413 (1905)."

See also *Canton v. Arizona*, 410 U.S. 351, 352, 93 S.Ct. 998, 999, 35 L.Ed.2d 346 (1973) (Per Curiam); and, see also *Quillon v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 554 n.13 (1978).

We also submit that there are at least two subsequent developments which would lessen any practical impact a decision of this Court could have in the present cases. The Preg-

nancy Discrimination Act, Pub.L. 95-598, Title III, §330, 92 Stat. 2679, has amended Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §2000e, *et seq.* and now prohibits discrimination "* * * on the basis of pregnancy, childbirth, or other related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, * * *." Title VII, of course, applies to state agencies and educational institutions by virtue of Pub.L. 92-261, 86 Stat. 103. Further, the Louisiana Legislature has declared that the disability portion of maternity leave does not interrupt the continuous active service requirement for sabbatical leave eligibility by La. Act. No. 385 of 1978, supra, at page 4 n.1. We also suggest that it is appropriate to consider the fact that each of the Petitioners has received their course of academic studies for the same period, or for even a longer period than sought by their initial applications for sabbatical leaves. In this connection, however, we must note that there still remains unresolved questions with respect to compensation rights for such leaves. See La.Rev.Stat.Ann. §17:1184, Appendix, p. 4. Thus, to that extent, there are no "special and important reasons" for granting a writ of certiorari in these cases. Rule 19 (1).

In their petition to this Court, the Petitioners herein apparently make two main arguments in support of the reasons for this Court to grant a writ of certiorari. At page 6 of the Petition, they assert that the decision below conflicts with this Court's decision in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974). At page 9 of their Petition, they state that they "are not alleging invidious

sexual discrimination." Nevertheless, the second main argument advanced is that the Sabbatical Leave Law, "as written and as applied to [petitioners] denies them equal protection because it accords them as pregnant teachers different treatment which is not based upon '* * * some reasonable differentiation fairly related to the object of the [statute] * * * .' " (Petition for Certiorari, p. 9).

Even if these two issues are properly before this Court, we nonetheless suggest that the facts and circumstances of these cases are such that the application of the decision in *LaFleur,* supra, or the reasonable classifications standard under the Equal Protection Clause, would not result in a reversal of the decisions of the lower court.

As a general overview of the Sabbatical Leave Law, we believe the lower appellate court correctly considered a sabbatical leave as one which, "[I]s not a vacation period that accrues after so many years of service." (Petition for Certiorari, Appendix, p. 22) Thus, the Louisiana Fourth Circuit Court of Appeal found, as a matter of state law, that there is no accrual of a vested right after the completion of either six or twelve semesters of continuous service as a member of the teaching corp. This, we submit is a proper interpretation of the Sabbatical Leave Law as the eligibility section, §1171, provides for the taking of such leave "for the two semesters immediately following any twelve or more consecutive semesters of active service in the parish where the teacher is employed, or for the semester immediately following any six or more consecutive semesters of service." This concept is reinforced in §1173 where, under certain circumstances, "[P]reference in every case

shall be given to the applicant who has rendered active service in the school system of the parish affected for the greatest numb[illegible] of consecutive semesters immediately preceding the period for which leave is requested, * * *." (Appendix A, *infra*, p. 1). Thus, the active service requirement is not one which simply *accrues*, it is a continuing one under the Sabbatical Leave Law.

In relying on this Court's decision in *LaFleur, supra*, Petitioners suggest by quoting therefrom that the School Board has unduly penalized Petitioners for deciding to bear a child. See *LaFleur, supra*, 414 U.S., at p. 648, 94 S.Ct., at p. 800.

This argument would have greater relevancy, if Petitioners had sought a sabbatical leave for the purpose of rest and recuperation which is a permitted purpose under the Sabbatical Leave Law. Were Petitioners claiming that they sought such leave because they were suffering from a medical condition related to their pregnancy or to childbirth, then this argument would have more superficial appeal. Yet that is not the case. Each of the Petitioners sought a sabbatical leave for the purpose of professional improvement, pursuing course work at universities.

We further suggest that Petitioners attempt to classify themselves as ones who were adversely affected simply because they were pregnant. This is an over simplification, and, to some extent, misleading. If they had claimed that they were unable to work during the entire period they were on maternity leaves because of pregnancy, childbirth, or some other medically related condition, then the decision in *LaFleur* would require close scrutiny of the actions of Respondent. We respectfully

suggest that it cannot be plausibly argued that a teacher, such as Petitioner White who sought a maternity leave in the summer of 1976 and remained on that leave through May, 1977, was being adversely affected simply because she was pregnant.

Nor is it suggested that Responsent required these Petitioners to take these lengthy maternity leaves of absence. As shown above, Petitioner Newman sought an extension of her maternity leave so that she could pursue her course work, which had been denied under the Sabbatical Leave Statute.

As justification for Respondent's action in denying eligibility to those teachers who had been on prolonged, elective maternity leaves, we would suggest that the granting of a sabbatical leave under state law is a recognition of continuous service for the required semesters. As the name of the law suggests, it is a respite after lengthy service.

We suggest that the facts and circumstances of this case clearly show that Petitioners' Equal Protection Claim is without merit as well.

During the course of the hearing on the Newell, et al. petition in the district court, Assistant Superintendent, Dr. Henry M. Williams, testified with respect to Respondent's implementation of its sabbatical leave practices. He testified, with respect to interruptions of active service; as follows:

> "All leaves without pay that have been granted by the Board and all breaks in the service, in service of the applicant, brief periods of retirement and things of that nature." (Tr. Jan. 6, 1978, p. 44).

Dr. Williams also testified that "* * * we would not issue back to back sabbatical [leaves] or that after having been granted a sabbatical leave that the applicant begins again to accrue consecutive semesters of credit towards the next sabbatical period." (*Ibid.*, at p. 46).

Under state law, the foregoing breaks in service are all of a voluntary nature. As to the statutory exemptions, we would certainly suggest that sick leaves and involuntary military service do not fall into the same classification as an elective and prolonged maternity leave of absence. The leave of absence for military service, of course, may be for voluntary or involuntary service. As to both, we suggest that the statutory approach in Louisiana in this regard is completely in conformance with the reemployment rights of veterans which Congress has protected. 38 U.S.C. § 2021, *et seq.*

The Congressional response to employment rights of pregnant employees has been treated as a discrimination problem, and thus similar to the protections under the Equal Protection Clause, by the Pregnancy Discrimination Act, *supra.* This Act, of course, severly restricts the application of, if not legislatively overrules, this Court's decision in *General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). Nevertheless, Congress has limited its concern to pregnancy discrimination only to disabilities occasioned by pregnancy, childbirth or other medically related conditions. See also *Geduldig v. Aiello,* 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974); and, *Richmond Unified School District v. Berg,* 98 S.Ct. 623 (1977) (Per Curiam).

CONCLUSION

For the foregoing reasons, Respondent opposes the Petition for Certiorari and respectfully suggests to this Court that a writ of certiorari should not be granted to review the judgments and opinions of the Louisiana Court of Appeal for the Fourth Circuit herein.

All of which is respectfully submitted.

POLACK, ROSENBERG, RITTENBERG
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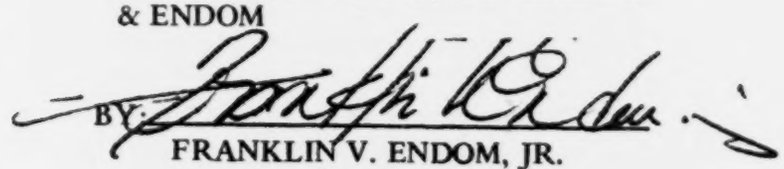
BY: 

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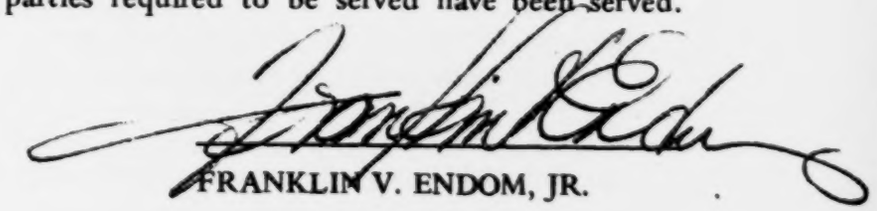
CERTIFICATE

I hereby certify that I have on this, the 21st day of December, 1979, served three copies of the foregoing Brief in Opposition upon Richard G. Vinet, Attorney for Petitioners, and that all parties required to be served have been served.



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days from the date of filing of the application whether the application has been granted or rejected, the reasons for such rejection shall be specified."

§1175. "No person whose application for sabbatical leave has been granted shall be denied such leave. Every application shall specify:

1. the period for which the leave is requested;

2. whether leave is requested for the purpose of professional or cultural improvement, or for the purpose of rest and recuperation;

3. the precise manner, in so far as possible in which such leave, if granted, will be spent;

4. the semesters spent in active service in the parish school system from which leave is requested; and

5. the date of birth of the applicant.

"The application shall contain a statement, over the signature of the applicant, that he agrees to comply with the provisions of this Sub-part.

"Every application for sabbatical leave for the purpose of rest and recuperation shall be accompanied by statements from two physicians certifying that the health of the applicant is such that the granting of such leave would be proper and justifiable."

§1176. "Any applicant who, at the expiration of the semester in which he applies, is ineligible for the sabbatical leave requested or who has not complied with the provisions of R.S. 17:1172 through 17:1174, shall have his or her application rejected, but all other applicants shall have

their applications granted, provided that all leaves requested in such applications could be taken without violating the following provision: At no time during the school year shall the number of persons on sabbatical leave exceed five per centum of the total number of teachers employed in a given parish; in cases of sick leave this limit of five per centum may be exceeded."

§1177. "Every person on sabbatical leave for the purpose of rest and recuperation shall spend such leave in a manner calculated to attain that purpose.

"Every person on sabbatical leave for the purpose of professional or cultural improvement shall, during each semester of leave:

1. pursue a program of study, earning at least ten undergraduate, or six graduate, credit hours, at an institution of higher learning accredited by the board of education of the state or territory in which such instiurion is located, provided that in case less than fifteen weeks is so spent the number of weeks less than fifteen not so spent be spent in one or the other of the two alternatives below enumerated; or

2. pursue a program of independent study, research, authorship or investigation which involved an approximately equivalent amount of work; or

3. engage in travel which is so planned as to be of definite educational value."

§1178. "Every person on sabbatical leave shall transmit to the superintendent within thirty days after the beginning of each semester of leave a written report of approximately one hundred words, of the manner in which such

leave will be spent, and within thirty days after the end of such leave, a written report of approximately two hundred and fifty words, of the manner in which such leave had been spent. In case such person has elected to spend any semester in accordance with provisions of R.S. 17:1177 (1), the initial report shall indicate the institution being attended and the number of credit hours being taken, and the final report shall be accompanied by official evidence that the number of credit hours required has been taken at the institution specified."

§1179. "Any person who fails to comply with the provisions of R.S. 17:1177 and 17:1178 may have his leave terminated by the superintendent at any time, except where non-compliance is due to conditions which would have constituted sufficient grounds for failing to perform his duties had he been in active service."

§1180. "No person on sabbatical leave shall be denied the regular increment of increase in salary because of absence on sabbatical leave."

§1181. "Service on sabbatical leave shall count as active service for the purpose of retirement and contributions to the retirement fund shall be continued."

§1182. "Every person on sabbatical leave shall be returned at the beginning of the semester immediately following such leave to the same position at the same school from which such leave was taken, unless otherwise agreed by him."

§1183. "Every person on sabbatical leave shall enjoy all the rights and privileges pertaining to his position and employment which he would have enjoyed had he not taken his leave but remained in active service in the schools in which he is employed."

§1184. "Each teacher granted sabbatical leave shall receive and be paid compensation at the rate of 50% of the minimum salary allowed a beginning teacher holding a bachelor's degree; provided, however, that any teacher on sabbatical leave may elect to be paid the difference between the salary he would have received during such leave if in active service in the position from which such leave is taken and the salary or compensation which a day by day substitute would receive during such leave, if assigned to that position; provided, further, that when a school board has fixed a rate of pay to be paid a day by day substitute teacher for each school day of teaching, the amount to be deducted from the pay of any teacher on sabbatical leave who elects to be paid under the option herein provided shall not exceed the amount fixed, whether or not a different amount actually is paid to the substitute for the teacher on sabbatical leave. Any school board may pay such additional compensation to teachers on sabbatical leave as it may establish and fix."

§1185. "Compensation payable to persons on sabbatical leave shall be paid at the times at which salaries of the other members of the teaching staff are paid, and in the same manner."

§1187. "Each person granted sabbatical leave shall sign an agreement or contract with his employing school board stipulating that, as a condition of his sabbatical leave and in order to be eligible for compensation during such leave, he will return to service for one semester for each semester of leave following the expiration of his leave in the school system granting the leave. Should a person taking sabbatical leave fail to return to service in the school system granting leave for one semester for each semester of leave following the expiration of such leave

for any reason other than incapacitating illness as certified by two physicians, that person shall forfeit all compensation received during the leave period, provided however, any school board may waive the provisions of this Section in accordance with prepublished criteria if it deems to be in the best interest of the school system to do so. No such waiver shall favor or discriminate against any employee or applicant because of his job description, age, race or sex."